

IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No.1134 of 2007

Reserved on 1.11.2007

Date of decision 12.11.2007

Udho Ram

Petitioner

Vs.

State of H.P. and others

Respondents

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?¹ No.

For the Petitioner: Mr.Onkar Jairath, Advocate.

For the respondents: Mr.M.S.Chandel, Advocate General, with
Mr.M.A.Khan and Ms.Meenakshi Sharma,
Dy. Advocate Generals, for the respondents.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the petitioner was engaged as daily wage driver from 13.9.1994. He met with an accident on 8.5.1995. He suffered fracture in the leg/hip and other orthopedic injuries and was moved to government hospital Bilaspur for treatment. He was referred to the zonal hospital Dharamshala where he remained under treatment till 7th August, 1995. The FIR of the accident was also lodged with Police Station, Ghumarwin District Bilaspur, H.P. He was issued medical fitness certificate by the doctor. His joining was not accepted by the employer. He made several representations for his re-engagement. The petitioner though had not placed on record the copies of

¹ Whether reporters of local papers are allowed to see the judgment? No.

the representations made but the petitioner had placed on record the copies of the postal receipts pertaining to the year 1997. He had also filed a claim petition before the learned Motor Accident Claims Tribunal-III Kangra at Dharamshala on 17.10.1995. His disability was assessed at 20% by the duly constituted medical board. The learned Motor Accident Claims Tribunal-III Kangra at Dharamshala had awarded a sum of Rs.2 lacs vide award dated 16.1.1999.

The petitioner sent a demand notice to his employer on 20.5.2003. Consequently the Labour Officer-cum-Conciliation Officer had tried to resolve the matter, but the same could not be resolved and the Labour Officer-cum-Conciliation Officer submitted his failure report. The respondent No.2 had refused to refer the matter to the Labour Court-cum-Industrial Tribunal, Dharamshala on the ground of delay in raising the industrial dispute vide order dated 24.12.2005. The petitioner filed a review petition seeking review of the order dated 24.12.2005. The review petition was rejected by the Labour Commissioner on 23.4.2007.

Mr.Onkar Jairath, learned counsel appearing for the petitioner had strenuously argued that communications dated 24.12.2005 and 27.4.2007 are not sustainable in the eyes of law. He further submitted that the Labour Commissioner had failed to exercise the jurisdiction vested in him by not referring the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala. He further contended that it was for the Labour Court to consider the aspect of delay or laches at the time of granting relief. Mr. M.S.Chandel, learned Advocate General, appearing for the respondents had supported the communications dated 24.12.2005 and 27.4.2007.

I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

The petitioner had met with an accident on 8.4.1995. He was hospitalized initially at Bilaspur and thereafter was referred to Zonal Hospital, Dharamshala where he remained under treatment upto 7.8.1995. He had made several representations as is evident from the postal receipts placed on record of this petition as Annexure PB. His disability was assessed at 20% by the duly constituted medical board as is evident from the contents of the Award dated 16.1.1999 passed by the learned Motor Accident Claims Tribunal-III, Kangra at Dharamshala.

The petitioner had raised a demand on 20.5.2003. The Labour Officer-cum-Conciliation Officer sent the failure report to the respondent No.2 on 9.12.2003. The State Government did not take any action on the failure report submitted by the Labour Officer on 9.12.2003 till 24.12.2005. The matter remained pending with the respondent No.2 for two years. The spirit of the Industrial Disputes Act, 1947 is to maintain industrial peace. It was incumbent upon the respondent No.2 to take prompt action on the failure report submitted by the Labour Officer-cum-Conciliation Officer on 9.12.2003.

The petitioner had filed review petition on 24.2.2007 which was also turned down on 23.4.2007. It is by now well settled that the State Government exercises only administrative powers while refusing or making reference to the Labour Court-cum-Industrial Tribunal. The power exercised is neither quasi-judicial nor judicial. The state Government has to apply its mind immediately after the receipt of the report from the Labour Officer-cum-Conciliation Officer.

Admittedly in the present case the failure report of the Labour Officer-cum-Conciliation Officer is dated 9.12.2003 but the State Government did not take any action for a period of two years and thereafter it had refused to take any action in referring the matter to the Labour Court on the ground that there was a delay in raising the dispute.

The Labour Commissioner had failed to take into consideration few vital issues while considering the failure report dated 9.12.2003. The Labour Commissioner should have taken into consideration the fact of the petitioner's receiving serious injuries in the accident dated 8.5.1995 and the petitioner remaining under treatment in the zonal hospital at Dharamshala up to August, 1995. His disability was assessed at 20% by the duly constituted medical board. The petitioner was about 27 years of age at the time when he met with an accident. He had made representations for his re-engagement in the year 1997.

True it is that there was delay in raising the dispute but in view of the facts discussed here in above, the same was not fatal for seeking reference to the Labour Court.

The Hon'ble Supreme Court has held in **Telco Convoy Drivers Mazdoor Sangh and another v. State of Bihar and others**, (1989) 3 SCC 271 that while exercising power under Section 10(1) of the Act the function of the appropriate government is an administrative function and not a judicial or quasi-judicial function. It is further held that in performing its administrative function the government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. Their Lordships of the Supreme Court have held as under :-

“ The learned counsel, appearing on behalf of the government, has produced before us an order dated April 13, 1989 of the government whereby the government has, upon a reconsideration of the matter, refused to make a reference under Section 10(1) of the Act. In refusing to make a reference, the government has adjudicated the dispute on its merits.

It is true that in considering the question of making a reference under Section 10(1), the government is entitled to form an opinion as to whether an industrial dispute “exists or is apprehended”, as urged by Mr. Shanti Bhushan. The formation of opinion as to

whether an industrial dispute “exists or is apprehended” is not the same thing as to adjudicate the dispute itself on its merits. In the instant case, as already stated, the dispute is as to whether the convoy drivers are employees or workmen of TELCO, that is to say, whether there is relationship of employer and employees between TELCO and the convoy drivers. In considering the question whether a reference should be made or not, the Deputy Labour Commissioner and/or the government have held that the convoy drivers are not workmen and, accordingly, no reference can be made. Thus, the dispute has been decided by the government which is, undoubtedly, not permissible.

It is, however, submitted on behalf of TELCO that unless there is relationship of employer and employees, or, in other words, unless those who are raising the disputes are workmen, there cannot be any existence of industrial dispute within the meaning of the term as defined in Section 2(k) of the Act. It is urged that in order to form an opinion as to whether an industrial dispute exists or is apprehended, one of the factors that has to be considered by the government is whether the persons who are raising the disputes are workmen or not within the meaning of the definition as contained in Section 2(k) of the Act.

Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate government is an administrative function and not a judicial or quasi-judicial function, and that in performing this administrative function the government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. See *Ram Avtar Sharma v. State of Haryana*; *M.P. Irrigation Karamchari Sang v. State of M.P.*; *Shambhu Nath Goyal v. Bank of Baroda, Jullundur*.

Applying the principle laid down by this Court in the above decisions, there can be no doubt that the government was not justified in deciding the dispute. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the government in exercise of its administrative function under Section 10(1) of the Act. As has

been held in M.P. Irrigation Karamchari Sangh case, there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the government should be very slow to attempt an examination of the demand with a view to declining reference and courts will always be vigilant whenever the government attempts to usurp the powers of the tribunal for adjudication of valid disputes, and that to allow the government to do so would be to render Section 10 and Section 12(5) of the Act nugatory.

We are, therefore, of the view that the State Government, which is the appropriate government, was not justified in adjudicating the dispute, namely, whether the convoy drivers are workmen or employees of TELCO or not and, accordingly, the impugned orders of the Deputy Labour Commissioner acting on behalf of the Government and that of the government itself cannot be sustained”.

The Hon’ble Supreme Court in **S.M.Nilajkar and others vs. Telecom District Manager, Karnataka**, (2003)4 SCC 27 has held that merely because the industrial dispute does not provide for a limitation for raising the dispute, it does not mean that the dispute can be raised at any time and without regard to the delay and reasons therefor. Their Lordships have held as under:-

“It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in *Shalimar Works Ltd. V. Workmen* that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute, it does not mean that the dispute can be raised at any time and without regard to the delay and reasons therefore. There is no limitation prescribed for reference of disputes to an Industrial Tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly so when disputes relate to discharge of workmen wholesale. A delay

of 4 years in raising the dispute after even re-employment of most of the old workmen was held to be fatal in *Shalimar Works Ltd. V. Workmen*. In *Nedungadi Bank Ltd. V. K.P.Madhavankutty* a delay of 7 years was held to be fatal and disentitled the workmen to any relief. In *Ratan Chandra Sammanta v. Union of India* it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants to any relief. Although the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in *Daily Rated Casual Labour v. Union of India* the Department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16.1.1990 they were refused to be accommodated in the Scheme. On 28.12.1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal-cum-Labour Court. We do not think that the appellants deserve to be non-suited on the ground of delay.

The fact remains that there was delay, though not a fatal one, in initiating proceedings calculating the time between the date of termination and initiation of proceedings before the Industrial Tribunal-cum-Labour Court. The employee cannot be blamed for the delay. The learned Single Judge has denied the relief of back wages while directing the appellants to be reinstated. That appears to be a just and reasonable order. Moreover, the judgment of the learned Single Judge was not put in issue by the appellants by filing an appeal.”

The Hon'ble Supreme Court has held in **Sudamdih Colliery of Bharat Coking Coal Ltd. Vs. Workmen Represented by Rashtriya Colliery Mazdoor Sang**, (2006)2 SCC 329 that as regards the question of delay in seeking reference, held, no formula for universal application could

be laid down and each individual case would be determined on its own facts. Their Lordships have held as under:-

“So far as delay in seeking the reference is concerned, no formula of universal application can be laid down. It would depend on the facts of each individual case”.

The Hon'ble Supreme Court in **Chief Engineer, Ranjit Sagar Dam and another v. Sham Lal**, (2006) 9 SCC 124 has reiterated that so far delay in seeking reference is concerned, no formula of universal application can be laid down and it would depend on the facts of each individual case. Their Lordships of the Supreme Court have held that reference made after a long delay was not entertainable.

Their Lordships of the Supreme Court in **Karan Singh v. M/s Executive Engineer Narayana State Marketing Board**, JT 2007(12) SC 141 have made following observations in a case where the workman had raised an industrial dispute after a period of six years and the Labour Court took the view that the claim was highly belated. The writ petition preferred by the workman was also dismissed by the High Court on the ground that the demand notice had been raised after six years. Their Lordships have held as under:

“In the aforesaid background, we would have normally set aside the award of the Labour Court and the High Court. But because of long passage of time, it would be inappropriate, particularly when appellant has not even offered any semblance of explanation for the delay.”

In the present case the workman had received injuries on 8.5.1995 and remained hospitalized till August, 1995 and thereafter made representations for his re-engagement. He also filed claim petition before the Motor Accident Claims Tribunal which was decided in the year 1999. There is delay in seeking the reference by the workman from 1997 to

2003. This delay cannot be treated an inordinate delay for seeking the reference more particularly when the State Government has itself taken two years to decide the issue whether reference could be made or not after the receipt of the failure report from the Labour Officer-cum-Conciliation Officer in the month of December, 2003.

Accordingly it is held that the decision of the State Government in declining to make a reference vide impugned order dated 24.12.2005 is unjustified. The State Government should have made the reference to the Labour Court-cum-Industrial Tribunal after taking the decision after due application of mind.

Consequently this writ petition is allowed and Annexure P-5 and Annexure P-6 dated 24.12.2005 and 23.4.2007 respectively are quashed and set aside. The Respondent No.2 is directed to take a fresh decision on the basis of the observations made here in above within a period of eight weeks from today.

November 12, 2007 (g)

(**Rajiv Sharma**), J.